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82-1808

In The

Supreme Court of the United States

October Term, 1983

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STATE OF NEBRASKA, ex rel.,
GREGORY A. MERCURIO, JR.,
Petitioner,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA,
Respondent.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion issued by the Supreme Court of the State of Nebraska on January 7, 1983, is reported at 213 Neb. 251, 329 N.W.2d 87 (1983) and appears in the separate Appendix A of the Petitioner's Brief.

JURISDICTION

The judgment of the Supreme Court of the State of Nebraska was entered on January 7, 1983. The Petitioner's motion for rehearing was overruled on February 16, 1983. The Petition for a Writ of Certiorari was

filed on May 5, 1983, 51 U.S.L.W. 3827 (May 17, 1983). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following constitutional, statutory and regulatory provisions are involved in the resolution of this matter: (1) Constitution: U.S. Const. amend. XIV, § 1; (2) Statutes: 20 U.S.C. § 1232(g) (1976) and Neb. Rev. Stat. § 27-1004(1) (Reissue 1979); (3) Regulations: 45 C.F.R. § 99 (1981) and University of Nebraska Medical Center Procedural Guidelines for Handling Student Appeals of Academic Evaluations (Appendix B of Petitioner's Brief).

STATEMENT OF FACTS

The Biochemistry Course

Mr. Gregory A. Mercurio, the Petitioner in this case, was a graduate student at the University of Nebraska Medical Center in the summer of 1978. He enrolled in the Biochemistry 510/810 course which started in July, 1978. This class was large, consisting of 177 students. A number of Biochemistry Department faculty lectured in the course. Dr. William Ruegamer, Biochemistry Department Chairman and the chief lecturer in the course, served as overall faculty coordinator. Students were graded in the course based upon their performance in three objective, multiple choice examinations. No subjective criteria such as class attendance, participation or clinical work were involved in assigning grades to students. Dr. Ruegamer and the other faculty had never met or heard of Mr.

Mercurio prior to the course (Trial Transcript 12:9-14:22). Indeed, the only contact Dr. Ruegamer had with Mr. Mercurio prior to the completion of the course and the awarding of final grades was when he allowed Mr. Mercurio to take a make-up examination after missing the first regularly scheduled exam in the course (Trial Transcript 19:19-20).

Grading Procedures for Examinations

A grading policy for the Biochemistry 510/810 course was made available to all students in the class (Trial Transcript 14:5-15:22). A copy of the grading policy was received in evidence (E1:15, Vol. II). The correct answers and the distribution of percentage scores for regularly scheduled examinations in the course were posted on the departmental bulletin board following administration of the examinations. The correct answers for make-up examinations were not posted. Regardless of whether a student took a make-up or regularly scheduled examination, the only way for a student to find out his individual letter grade was to contact the Biochemistry departmental secretary. Therefore, it was impossible for the Petitioner to follow the procedure described in his Brief (at 3) for the first examination, and imprudent for him to rely on his self-scored performance for the second examination. At any time prior to the completion of the course the Petitioner could have learned what his grades were by checking with the departmental secretary, whose work place was in the vicinity of the bulletin board.

All three regularly scheduled exams were given in the same fashion. The students recorded their answers to the multiple choice questions by blackening

circles on computer answer sheets. The answer sheets were identified by each student's name and social security number, which he or she wrote on the answer sheet. The answer sheets were then computer graded (Trial Transcript 18:17-19:13). This process resulted in a printout showing the percentage score each student had received (Trial Transcript 34:4-25; E3:36, Vol. II).

There was a procedure by which those students who were unable to take a regularly scheduled exam could take a make-up exam (Trial Transcript 19:16-23). This situation occurred after each regularly scheduled exam and resulted in 20 to 25 students, perhaps 6 to 8 students each exam, taking a scheduled make-up examination that academic term (Trial Transcript 39:23-25). When taking a make-up examination a student would record his answers directly on the exam booklet. Each booklet would then be hand graded by a faculty member immediately after the testing had concluded (Trial Transcript 19:25-20:17).

Each student's score on each exam, whether the student had taken the regularly scheduled exam or the make-up exam, was recorded on his separate grade record sheet maintained in the Biochemistry Department (Trial Transcript 16:1-17:2). The score recorded was taken directly from the computer graded answer sheet, if the student had taken the regularly scheduled exam, or from the hand graded exam booklet, if the student had taken the make-up exam. Such a grade sheet was maintained for Mr. Mercurio (Trial Transcript E2:17, Vol. II).

Mr. Mercurio was unable to take the first regularly scheduled examination. Instead, he took the make-up

examination scheduled for students who had missed the first exam. This make-up examination was administered to Mr. Mercurio and other students by Dr. John Hofert, one of the teachers in the Biochemistry course (Trial Transcript 53:10-19). Dr. Hofert recalls Mr. Mercurio taking this examination and also recalls that he or Dr. Mahowold, another teacher, immediately hand graded Mr. Mercurio's make-up examination (Trial Transcript 53:22-54:14). Dr. Hofert specifically recalls that Mr. Mercurio's score on the exam was 42% (Trial Transcript 54:15-20). This score was entered on Exhibit 2, Mr. Mercurio's grade record sheet, by Mrs. Dickmeyer, the Biochemistry Department secretary. She specifically recalls Mr. Mercurio's test booklet and the score of 42% on it (Trial Transcript 156:7-158:10).

Mr. Mercurio took the regularly scheduled examination numbers two and three. His answer sheets were graded by a computer along with those of the other students in the course. After each exam, Mrs. Dickmeyer recorded his score on his grade record sheet, Exhibit 2. His three examination scores were:

Examination No. 1	42%
Examination No. 2	56%
Examination No. 3	69%
Final average	56%

(Trial Transcript Exhibit 2:17, Vol. II).

A grading committee for the Biochemistry Department voted on the cutoff points between the various letter grades. This voting was done without the Committee knowing how any particular student had performed in the course. The Committee voted to make 60% the dividing line between a "D" and a "F" in the

course. Mr. Mercurio's 56% was the lowest grade in the class. The next lowest grade before Mr. Mercurio's was 61%. Therefore, Mr. Mercurio was awarded an "F" in the course. (Trial Transcript 21:10-24: 25).

Mr. Mercurio took his three exams on August 4, August 26, and September 6, 1978. It should be noted that within three to four days after each exam, after the scores for each exam had been recorded on the students' grade record sheets, students could find out their score by going to the Department of Biochemistry and asking the Department secretary (Trial Transcript 25:5-12).

Mr. Mercurio Questions His Grade

The course concluded in the first week of September, 1978 and final grades were thereafter awarded to all students. About one week later, on September 15, 1978, Mr. Mercurio met with Dr. Ruegamer about his grade. Mr. Mercurio indicated that he had a question about his grade on Exam #2. Specifically, he felt that he had inadvertently made a transposition error in filling in his answers on his answer sheet for that exam (Trial Transcript 100:21-101:2; 146:5-18). Dr. Ruegamer agreed to review the matter and meet Mr. Mercurio on September 19, 1978.

Before this next meeting, Dr. Ruegamer retrieved Mr. Mercurio's computer answer sheet for Exam #2 from the Department's file. Both he and another faculty member each inspected and hand graded Mr. Mercurio's answer sheet for that exam (Trial Transcript 30:10-17). They both reached the same result as

the computer, 56% correct answers (Trial Transcript 38:2-6). At their September 19 meeting, Dr. Ruegamer and Mr. Mercurio reviewed his answer sheet for Exam #2. Mr. Mercurio continued to state that the result must have been a transposition error, but did not dispute the fact that the 56% actually reflected the answers on his answer sheet (Trial Transcript 109:13-110:22 and 148:1-14). Dr. Ruegamer explained that the Department could not make any adjustment based upon the claim of a transposition error after exams were handed in and graded (Trial Transcript 109:16-24). At no time during these meetings did Mr. Mercurio question his score on Exam #1 or ask to see his answer sheet for that exam (Trial Transcript 148:9-13 and 105:7-9).

The Missing Examination Papers

Dr. Ruegamer testified that he never saw Mr. Mercurio's answer sheet for Exam #2 after he discussed it with him on September 19, 1978 (Trial Transcript 32:5-34:1). He first realized that he could not locate it in December, 1978, when he was asked to review that matter with Mr. Mercurio's faculty advisors (Trial Transcript 46:1-3). Apparently the exam was somehow lost in the process of the post-course review with Mr. Mercurio (Trial Transcript 32:5-22).

As indicated, after the September, 1978 meetings with Mr. Mercurio, Dr. Ruegamer had no reason to believe that Mr. Mercurio's answer booklet to Exam #1 was in question (Trial Transcript 41:17-19 and 148:9-13). After the course, it was at all times kept with the 20 to 25 other exam booklets for the course which had been used by students in taking make-up exams. At

some time, two or three months after the course was concluded, Dr. Ruegamer placed the file containing all these make-up exams in the Department secretarial office to be refiled in old storage (Trial Transcript 149:15-150:20). Instead, they were apparently discarded (Trial Transcript 149:15-151:14). This fact was not discovered until after May, 1979, when Mr. Mercurio lodged an internal grade appeal (Trial Transcript 115:21-116:8).

Petitioner's Brief contains a gross misstatement of fact on pages 5 and 11. Petitioner, citing the clearly erroneous finding of the trial court, therein contends that only the two examination papers of the Petitioner could not be produced by the University. It is true that of all the answer sheets for Examination #2, only the Petitioner's was missing. Dr. Ruegamer testified that he never saw the Petitioner's answer sheet for Examination #2 after he discussed it with the Petitioner on September 19, 1978 (Trial Transcript 32:5-34:1). He first realized that he could not locate it in December, 1978, when he was asked to review the matter with the Petitioner's faculty advisors (Trial Transcript 46:1-3). However, *all* of the 20 to 25 answer sheets for all make-up examinations were missing (Trial Transcript 82:13-14 and 149:15-151:14), a fact which was not discovered until after May, 1979, when Petitioner lodged an internal grade appeal and questioned his score for Examination #1 for the first time (Trial Transcript 115:21-116:8).

The Internal Appeal

Mr. Mercurio sought and was granted a grade appeal hearing at the University. By the time he ap-

pealed in May, 1979, new grade appeal procedures were in place and the appeal was heard under these procedures (Trial Transcript E5 and E6; 62, Vol. II). The Grade Appeals Committee did not actually hear the appeal until March, 1980, because the Petitioner filed his original petition for writ of mandamus in September, 1979, asking the District Court to require the hearing to follow the statutory rules of hearing procedure for administrative agencies. Eventually, the ground rules for the hearing were agreed upon by the University and Mr. Mercurio and two days of hearings were conducted (Trial Transcript 57:8-61:10). The Appeals Committee heard the facts of the case, including the evidence the Biochemistry Department had to corroborate the grade, and decided the grade should stand despite the absence of the missing exam papers. A complete tape of the two days of hearing testimony and a complete file of all written material presented at the Grade Appeals Committee was maintained (E7 and E8; 67, Box). After this record had been reviewed and the Appeals Committee decision approved by the Executive Vice President for Academic Affairs at the University, Mr. Mercurio filed his amended petition resulting in the order of the trial court (Appendix C of Petitioner's Brief). The University appealed the trial court's order and the Supreme Court of the State of Nebraska in a unanimous opinion reversed the decision of the trial court and dismissed the Petitioner's action, vacating the writ of mandamus. The Petitioner filed a motion for rehearing before the Nebraska State Supreme Court arguing that the Court had failed to consider the issue of deprivation of Petitioner's right of due process. That motion was summarily overruled without opinion on February 16, 1983.

The Petitioner now complains of the failure of the Nebraska Supreme Court to address the Petitioner's argument that he had been denied due process of law.

ARGUMENTS

This Court should deny the Petitioner's request for issuance of a writ of certiorari for the following reasons:

1. Properly exercising self-restraint, the Nebraska Supreme Court carried out its general and basic judicial duty to avoid the decision of a constitutional question.

The policy of strict necessity in disposing of constitutional issues is a useful device that helps assure that judicial review does not take place gratuitously. Nowak, Rotunda, and Young, *Handbook on Constitutional Law* (1978) 84. Constitutional issues will not be determined if the record presents some other ground upon which the case may be disposed of. *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-574 (1947).

2. The Nebraska Supreme Court's opinion rests on adequate and independent state grounds.

This Court, from the time of its foundation, has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945). The Supreme Court is without jurisdiction because the Nebraska Supreme Court, although pre-

sented with a federal ground of decision only chose to base its decision on the non-federal grounds which in and of themselves do not violate federal law. *Wood v. Chesborough*, 228 U.S. 672 (1913).

3. The Petitioner's argument that he has been denied due process of law is totally devoid of merit.

The Petitioner argues in his Brief at 15 that no copies or secondary evidence were offered by the Respondent at the trial concerning the contents of Examination #1 and Examination #2. This ignores the portion of the Nebraska Supreme Court's opinion that the record before it on appeal was replete with

> the testimony of various faculty and administrative personnel [that] was uncontradicted that they had examined the missing documents, had graded them, and that the grade was directly transferred to the grade sheet of Mercurio. There is simply no evidence of bad faith, malice, or fraud. If we accepted Mercurio's argument, any student who received a failing grade in any course who discovered one of his examination papers was missing from the University records could have his grade expunged because the record had been lost, misplaced, or destroyed. The secondary evidence as to the missing documents in the present case was given by witnesses under oath subject to the rigors of cross-examination, and it was more than sufficient to establish the accuracy and validity of the grading of the missing documents.
>
> 213 Neb. 251, 258; 329 N.W.2d 87, 91-92 (1983).

The Petitioner, in his Brief at 13, ascribes the University's failure to produce the examination papers for

examinations one and two to possible "misconduct" by the Respondent. It is important to note that the University briefed and argued in its Reply Brief before the Nebraska Supreme Court the proposition that "Bad faith or intentional obstruction of justice is necessary to support the implication of the doctrine of spoliation. Mere negligence is not enough to invoke the doctrine of spoliation." See Reply Brief of the University, Argument III, pages 6-10. This explains why the Nebraska Supreme Court chose to include the sentence that "There is simply no evidence of bad faith, malice or fraud." 213 Neb. at 258; 329 N.W.2d at 91 (1983). Having reviewed the record, the Nebraska Supreme Court applied the relevant statute, Neb. Rev. Stat. § 27-1004(1) (Reissue 1979), to the facts on the record before it. It concluded that as a matter of the law of evidence the Petitioner failed to show that he was entitled to the particular relief requested and granted by the trial court and that the Board of Regents of the University of Nebraska was legally obligated to act. 213 Neb. at 259. The Petitioner's Brief before this Court at 15 describes that holding as "irrelevant to the facts and issues of this case." *Ipse dixit.*

In addition, as the Respondent pointed out in its Reply Brief filed in the Supreme Court of the State of Nebraska at 9: "With respect to the second examination, in addition to the testimony of witnesses, the University had (and still has) the original computer printout showing the [Petitioner's] score for the second examination. The remarks of the trial court in- (139:7-142:25) on the subject of computer printoutarding dicate a disregard for the law of evidence regarding business records as enunciated in *Bobbie Folks, Inc. v. Hyatt*, 195 Neb. 596, 239 N.W.2d 782 (1976)." The original of the computer printout was introduced at trial as Exhibit No. 3.

The meritless nature of the Petitioner's due process claims lies in their failure to address a line of cases involving allegations by unsuccessful test takers that an examiner violated constitutional guarantees to due process of law by failing to produce copies of the applicants' examination papers, thereby denying a failing applicant an opportunity to examine the applicant's own examination.

In *Brewer v. Wegmann*, 691 F.2d 216 (5th Cir. 1982) an unsuccessful applicant for membership in the Louisiana State Bar brought an action alleging that the examining bar association denied her due process by destroying examinations after they were graded. The U.S. District Court for the Eastern District of Louisiana, George Arceneaux, Jr. J., dismissed the complaint. The Court of Appeals in a per curiam opinion held that the bar examination procedure which included the destruction of examinations after grading thereby denying a failing applicant an opportunity to examine her own examination or secure review of the fairness of the grade did not violate due process of law. The *Brewer* Court relied on a well established body of law citing to *Singleton v. Louisiana State Bar Association*, 413 F.Supp. 1092, 1098-1100 (E.D.La. 1976) and *Tyler v. Vickery*, 517 F.2d 1089, 1103-1105 (5th Cir. 1975). See generally: Annot., *Court Review of Bar Examiner's Decision on Applicant's Examination*, 39 A.L.R.3d 719 (1971); Annot., *Due Process Requirements of Proceedings Involving Applications for Admission to Bar*, 2 A.L.R.3d 1266 (1965); Annot., *Validity, Under Federal Constitution of State Bar Examination Procedures*, 30 A.L.R.Fed. 934 § 6[b] (1976). *Whitfield v. Illinois Board of Law Examiners*, 504 F.2d 474 (7th Cir. 1974).

The Petitioner's Brief in its presentation of the question to this Court argues at 12 that "It is axiomatic to suggest that an agency of state is required to follow its own rules and, in this instance, the failure to do so is a separate and distinct due process violation." The Petitioner cites no authority for this axiom. When the Petitioner comes forward with something more than rhetoric in support of this claim, the University will respond to his bald assertion.

As was the situation in *Tyler v. Vickery, supra*, the Petitioner, rather than engaging in litigation, would be well advised to direct his resources toward retaking the course and proving his merit on subsequent examinations.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to review the judgment and opinion of the Supreme Court of the State of Nebraska should be denied.

Respectfully submitted,

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